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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHERIE LOU DUVAL, Defendant and Appellant.	2d Criminal No. B234485 (Case No. 2008029791) (Ventura County)

A jury found that Cherie Lou Duval (Duval) committed grand theft from the Coalition to End Family Violence (Coalition) while acting as its chief executive officer (CEO). Duval challenges her convictions for theft and false personation as well as her four-year and four-month sentence. We modify Duval's sentence to stay the false personation count and affirm the judgment in all other respects.

FACTS AND PROCEDURAL HISTORY

I. *The Crimes*

The Coalition is a nonprofit agency that provides a shelter and counseling services to victims of domestic violence, rape and other sexual assaults. Duval served as the Coalition's CEO from 2002 until her resignation in early 2008. As CEO, Duval was responsible for the day-to-day operations of the Coalition.

To carry out these duties, Duval was issued a VISA credit card and authority to write checks on a small checking account for petty cash-type needs. These were to be used solely for Coalition expenses. She also possessed rubber stamps bearing the signatures of certain members of the Coalition's Board of Directors (Board). The stamps were to be used for payroll and to sign checks when a Board member was unavailable.

During her tenure as CEO, Duval used the VISA credit card to pay for her personal expenses, including tutoring for her stepson. She wrote checks against the Coalition's checking account to buy, among other things, a sofa, grandfather clock and marble game table that she initially had delivered to her home. She used the signature stamps on paperwork authorizing her to cash out allegedly unused vacation time and to give herself a raise. She traded in the Coalition's van for a Kia for her stepson. None of these actions was authorized.

II. *The Prosecution*

The People charged Duval with four counts of grand theft, in violation of Penal Code section 487.[1] More specifically, Duval was charged with taking the Coalition's funds (1) by making personal purchases with the Coalition's VISA credit card between July 2003 and February 2008 (count 1); (2) by paying personal expenses with the Coalition's small checking account between March 2005 and November 2007 (count 2); (3) by giving herself an unauthorized pay raise and unauthorized vacation pay cash-outs between January 2005 and February 2008 (count 3); and (4) by trading in the Coalition's van for a car for her stepson in July 2006 (count 4). The People also alleged a loss enhancement based on the total losses of more than $65,000 for all four theft offenses under section 12022.6. The People further charged Duval with two counts of false personation, in violation of

[1] All statutory references are to the Penal Code unless otherwise stated.

section 529, for her use of the signature stamps of Coalition Board members Phillip Chase (count 5) and Maureen Turley (count 6).

The jury convicted Duval of all four theft counts and the false personation count involving Maureen Turley.

After the trial court denied her new trial motion, Duval was sentenced to four years and four months in prison. The court imposed a low-term sentence of 16 months on count 1. The court ruled that the remaining theft counts should not be stayed pursuant to section 654 because they "involved separate conduct with separate schemes and separate thefts." The court imposed a consecutive sentence of eight months (one-third the mid-term sentence of two years) for each of the remaining theft counts. The court then imposed a consecutive one-year term for the aggregated loss enhancement. The court imposed a concurrent sentence on the false personation count.

DISCUSSION

I. *The Jury Instructions*

Duval argues that the trial court erred by using the theft-by-larceny jury instruction for all four theft offenses. She asserts that misuse of the Coalition's small checking account is better characterized as theft by embezzlement, and that her receipt of excess compensation is more aptly considered theft by false pretenses.[2] Because the elements of theft by embezzlement and by false pretenses are different from the elements of theft by larceny, Duval contends that the jury was instructed on the wrong offenses. She concludes that she is entitled to a new trial because this error was not harmless beyond a reasonable doubt.

Duval is not entitled to a new trial because the premise of her argument is incorrect. We review jury instructions de novo (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1311-1312), and we conclude that the trial court's

[2] Duval does not challenge the instructions as they pertain to her other two theft convictions.

instructions were proper in this case. Duval's theft through misuse of the small checking account and by giving herself unauthorized raises and cash outs are forms of larceny.

The gist of larceny is the acquisition of another's property without consent. (See *People v. Kagan* (1968) 264 Cal.App.2d 648, 658-659 (*Kagan*).) Larceny includes situations in which a person obtains property for a specific purpose and instead converts it to her own use. (*People v. Traster* (2003) 111 Cal.App.4th 1377, 1387-1388; *Kagan*, *supra*, at p. 659.) This is what Duval did with the small checking account and the excess salary. The Coalition gave her the funds in the small checking account for the specific purpose of conducting the Coalition's business, yet she converted it to her own use by buying furniture for her home. The Coalition also gave her the signature stamps for use in accessing the payroll and other checking accounts for authorized Coalition business, but Duval took money from those accounts without authorization and for her personal gain.

Duval offers two reasons why larceny is the wrong offense. First, she notes that larceny requires a defendant to "carry away" the stolen items. She points out that she never physically carried away the Coalition's funds. We disagree. In addition to physical "carrying away," the asportation requirement is also met when a defendant receives money she has converted to her own use. (*People v. Bartges* (1954) 126 Cal.App.2d 763, 770; *People v. Woolson* (1960) 181 Cal.App.2d 657, 668.)

Second, Duval argues that other crimes fit her criminal conduct "better." She says that she obtained her excess salary by false pretenses. However, theft by false pretenses entails a victim's consensual surrender of property based on a defendant's misrepresentations. (*People v. Beaver* (2010) 186 Cal.App.4th 107, 121.) Duval did not lie to anyone at the Coalition to get the excess salary; she falsified documents purporting to authorize the salary and then took the additional pay. The fact that documents were presented to the Coalition's bookkeeper, whose job it was to cut checks, does not convert Duval's crime into one involving false

pretenses. Duval also argues that embezzlement might also be appropriate for her crimes. We agree. (*Kagan, supra*, 264 Cal.App.2d at p. 659.) Yet the propriety of additional alternate theories does not render larceny invalid when larceny is also appropriate.

II. *Exclusion of Exhibits*

Duval asserts that the trial court abused its discretion in excluding several defense exhibits that listed her actual salary. She argues that these exhibits were shown to the Coalition's Board. She contends that the Board's acquiescence to her salary as listed in those exhibits is relevant to show the Board's authorization of that salary or her good faith belief of such authorization. We review the exclusion of evidence for an abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.)

The trial court excluded Defense Exhibit A (a cost-allocation spreadsheet) and Defense Exhibits E, F, and GG (grant applications submitted to the State's Office of Emergency Services) as hearsay. Duval asserts that they were admissible as the Coalition's business records. (Evid. Code, § 1271.) We need not decide this issue because the exclusion of these exhibits does not make a different outcome reasonably probable. (*People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*).) Duval and other witnesses testified that these exhibits listed her salary and were shown to the Board. Admission of the exhibits themselves adds little to this testimony.

The court also excluded Defense Exhibits OO, PP, QQ, and RR (Coalition submissions to Ventura County's Human Services Agency) under Evidence Code section 352. The court found their relevance to be "very, very, very marginal" because, in its view, the Board's review of documents containing information including Duval's salary did not equate to authorization of that salary. This ruling was not an abuse of discretion. Additionally, because the jury heard ample evidence of the Board's review of a multitude of documents containing

Duval's salary, exclusion of further examples is not a ground for reversal. (See *Watson*, *supra*, 46 Cal.2d at p. 837.)

III. *New Trial Motion*

In her motion for new trial, Duval raised at least 14 instances of alleged ineffectiveness of her trial counsel. On appeal, she contends that the trial court erred in not specifically responding to her claim regarding the effectiveness of her counsel's closing argument, and in denying the motion on that ground. The trial court's silence on a specific ground is not a basis for reversal. (*People v. Ross* (1988) 205 Cal.App.3d 1548, 1553.) We review the trial court's denial of a new trial motion for an abuse of discretion. (*People v. Howard* (2010) 51 Cal.4th 15, 42-43.)

In assessing whether an attorney's performance is constitutionally inadequate, we examine whether (1) counsel's representation fell below an objective standard of reasonableness; and (2) a different outcome was reasonably probable if not for counsel's deficient performance. (*People v. Gamache* (2010) 48 Cal.4th 347, 391 (*Gamache*).) We presume counsel acts competently, particularly with matters of trial strategy. (*Ibid.*) Counsel's decisions about how to present a closing argument are "inherently tactical." (*People v. Freeman* (1994) 8 Cal.4th 450, 498.)

Duval levels four criticisms at her counsel's closing argument. First, she complains it was confused and jumbled, and notes that her counsel failed to mention a key exhibit. Although counsel's argument was not a model of clarity, disorganization alone does not amount to deficient performance. (*People v. Williams* (1997) 16 Cal.4th 153, 219.) More importantly, the *substance* of counsel's argument reflected a reasonable strategy. Counsel developed a two-pronged theme: (1) the prosecution was based on information amassed by a Coalition employee with a grudge against Duval; and (2) the Coalition's Board was trying to cover for its own incompetence by blaming Duval, who was a hard-working employee devoted to the Coalition.

Second, Duval argues that the court sustained several objections to her counsel's closing argument. The court also overruled a few. Duval has not explained why eliciting a mix of sustained and overruled objections is proof of incompetence.

Third, Duval contends her counsel erred in conceding that she "blurred the lines" between her personal and professional lives. Counsel made this argument in support of the over-arching theme that Duval was dedicated to the Coalition. "[S]ensible concessions are an acceptable and often a necessary tactic. [Citation.]" (*Gamache*, *supra*, 48 Cal.4th at p. 392.)

Fourth, Duval argues that her counsel did not explicitly refer to the good faith defense, her primary defense. Counsel did not refer to the defense by name, but he argued that the Board was aware of her allegedly unauthorized salary. Even if we assume that counsel should have also mentioned the defense instruction, this lapse is not prejudicial because the trial court instructed the jury on that defense. (*People v. Thomas* (1992) 2 Cal.4th 489, 532.)

IV. *Sentencing*

Duval contends that the trial court should have stayed under section 654: (1) the subordinate theft counts (counts 2, 3, and 4); and (2) the false personation count (count 6). We review the trial court's section 654 ruling for substantial evidence. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368.) We disagree with her first contention, but agree with her second.

Section 654 requires a court to stay the punishment for multiple counts that are "incident to one objective." Crimes may be punished separately if the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other . . . ." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Courts are careful not to define a defendant's objective too broadly. Doing so would under-punish a defendant and reward her with a lower sentence "simply because [she] chose to repeat, rather than to diversify or alternate, [her] many crimes. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 337.)

A. *Subordinate Theft Counts*

Although all four theft offenses occurred during the same general period of time when Duval was CEO and each victimized the Coalition, the thefts counts are otherwise distinct. They occurred on different dates, from different Coalition accounts, and using different methods ranging from outright theft (of the van) to creating false invoices (for the VISA credit card) to using signature stamps (to authorize salary increases). The offenses are sufficiently distinct to warrant separate punishment. (Accord, *People v. Neder* (1971) 16 Cal.App.3d 846, 853-855 [separate forgeries committed a different times; § 654 does not apply].)

Duval offers two reasons why the trial court's ruling was wrong. First, she argues that the jury found she engaged in a "common scheme or plan" when it found the loss enhancement to be true. This is of no moment because the degree of commonality required for the aggregation of losses under section 12022.6 is much lower than the degree required for staying punishment under section 654. Section 654 turns on whether the defendant's objectives in connection with the individual counts are independent or incidental; section 12022.6 asks only whether the counts are "caused by a general plan . . . ." (*People v. Green* (2011) 197 Cal.App.4th 1485, 1502.) Because these standards are distinct, the trial court's refusal to stay punishments under section 654 is consistent with the jury's aggregation of loss.

Second, Duval argues that section 654 applies because her theft offenses constitute a "single offense" within the meaning of *People v. Bailey* (1961) 55 Cal.2d 514. This argument mixes apples and oranges. *Bailey* deals with the separate issue of whether multiple thefts must be charged as a single crime. *Bailey* uses a different standard than section 654, and is accordingly irrelevant. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1254-1255.)

B. *False Prosecution Count*

The false personation count arises from Duval's misuse of Turley's signature stamp to obtain excess salary. As the People concede, it is part and parcel

of the theft offense charged in count 3. Consequently, the false personation count must be stayed under section 654.

DISPOSITION

We modify the judgment to stay the sentence on the false personation count (count 6). The Superior Court Clerk shall prepare an amended abstract of judgment incorporating this modification and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

HOFFSTADT, J.*

We concur:

GILBERT, P. J.

YEGAN, J.

* Assigned by the Chairperson of the Judicial Council.

Nancy Ayers, Judge

Superior Court County of Ventura

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